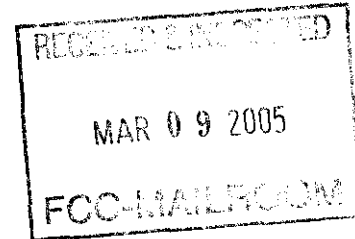


Before the  
Federal Communications Commission  
Washington, D.C. 20554



In the Matter of: )

Implementation of Section 207 of the Satellite  
Home Viewer Extension and Reauthorization Act  
of 2004 )

MB Docket No. 05-89

Reciprocal Bargaining Obligations )

### NOTICE OF PROPOSED RULEMAKING

**Adopted: March 2, 2005**

**Released: March 7, 2005**

**Comment Date: 30 days after publication in the Federal Register**

**Reply Comment Date: 45 days after publication in the Federal Register**

By the Commission:

#### I. INTRODUCTION

1. In this Notice of Proposed Rulemaking ("*Notice*") we seek comment on the implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").<sup>1</sup> Section 207 extends Section 325(b)(3)(C) of the Communications Act until 2010 and amends that section to impose reciprocal good faith retransmission consent bargaining obligations on multichannel video programming distributors ("MVPDs"). This section alters the bargaining obligations created by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") which imposed a good faith bargaining obligation only on broadcasters.<sup>2</sup> As discussed below, because the Commission has in place existing rules governing good faith retransmission consent negotiations and because Congress did not instruct us through the SHVERA to modify those rules in any substantive way, we tentatively conclude that the most faithful and expeditious implementation of the amendments contemplated in Section 207 of the SHVERA is to extend to MVPDs the existing good faith bargaining obligation imposed on broadcasters under our rules.

<sup>1</sup> The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (2004) (to be codified at 47 U.S.C. § 325). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005." The SHVERA requires that the Commission prescribe regulations implementing Section 207 within 180 days after the date of the enactment thereof.

<sup>2</sup> SHVIA was enacted as title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

## II. DISCUSSION

### A. The Good Faith Provisions of SHVIA

2. Section 325(b)(3)(C) of the Communications Act, as enacted by the SHVIA, instructed the Commission to commence a rulemaking proceeding to revise the regulations by which television broadcast stations exercise their right to grant retransmission consent.<sup>3</sup> Specifically, that section required that the Commission, until January 1, 2006:

prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.<sup>4</sup>

The Commission issued a Notice of Proposed Rulemaking seeking comment on how best to implement the good faith and exclusivity provisions of the SHVIA.<sup>5</sup> After considering the comments received in response to the notice, the Commission adopted rules implementing the good faith provisions and complaint procedures for alleged rule violations.<sup>6</sup>

3. The *Good Faith Order* determined that Congress did not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission.<sup>7</sup> Instead, the order found that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement.<sup>8</sup> Consistent with this conclusion, the *Good Faith Order* adopted a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards.<sup>9</sup> First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD.<sup>10</sup>

<sup>3</sup> 47 U.S.C. §325(b)(3)(C).

<sup>4</sup> 47 U.S.C. §325(b)(3)(C)(ii).

<sup>5</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 14 FCC Rcd 21736 (1999) ("Good Faith Notice").

<sup>6</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) ("Good Faith Order"), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

<sup>7</sup> *Good Faith Order*, 15 FCC Rcd at 5450.

<sup>8</sup> *Id.* at 5453-54.

<sup>9</sup> *Id.* at 5457-58.

<sup>10</sup> *Id.* at 5462-5464; *see* 47 C.F.R. §§ 76.65(b)(1)(i)-(vii).

4. The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the specific standards enumerated above, given the totality of the circumstances constitute a failure to negotiate in good faith.<sup>11</sup>

5. The *Good Faith Order* provided examples of negotiation proposals that presumptively are consistent and inconsistent with "competitive marketplace considerations."<sup>12</sup> The *Good Faith Order* found that it is implicit in Section 325(b)(3)(C) that any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement.<sup>13</sup> The order stated that considerations that are designed to frustrate the functioning of a competitive market are not "competitive marketplace considerations." Further, conduct that is violative of national policies favoring competition - that, for example, is intended to gain or sustain a monopoly, an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute.<sup>14</sup>

6. Finally, the *Good Faith Order* established procedural rules for the filing of good faith complaints pursuant to Section 76.7 of the Commission's rules.<sup>15</sup> The burden of proof is on the complainant to establish a good faith violation and complaints are subject to a one year limitations period.<sup>16</sup>

#### **B. The Reciprocal Bargaining Obligations of SHVERA**

7. In enacting the SHVERA good faith negotiation obligation for MVPDs, Congress used language identical to that of the SHVIA imposing a good faith obligation on broadcasters, requiring the Commission, until January 1, 2010, to:

prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations.<sup>17</sup>

Congress did not instruct the Commission to amend its existing good faith rules in any way other than to implement the statutory extension and impose the good faith obligation on MVPDs. Accordingly, we believe that Congress did not intend that the Commission revisit the findings and conclusions that were reached in the SHVIA rulemaking. The little legislative history directly applicable to Section 207 supports this approach and, in pertinent part, provides:

<sup>11</sup> *Good Faith Order*, 15 FCC Rcd at 5458; see 47 C.F.R. § 76.65(b)(2).

<sup>12</sup> *Good Faith Order*, 15 FCC Rcd at 5469-70.

<sup>13</sup> *Id.* at 5470.

<sup>14</sup> *Id.*

<sup>15</sup> 47 C.F.R. § 76.65(c); see 47 C.F.R. § 76.7.

<sup>16</sup> 47 C.F.R. §§ 76.65(d) & (e).

<sup>17</sup> 47 U.S.C. § 325(b)(3)(C)(iii).

In light of evidence that retransmission negotiations continue to be contentious, the Committee chose to extend these obligations, and also to begin applying the good-faith obligations to MVPDs. The Committee intends the MVPD good-faith obligations to be analogous to those that apply to broadcasters, and not to affect the ultimate ability of an MVPD to decide not to enter into retransmission consent with a broadcaster.<sup>18</sup>

We believe that the implementation of Section 207 most consistent with the apparent intent of Congress is to amend our existing rules to apply equally to both broadcasters and MVPDs. We tentatively conclude that we should amend Sections 76.64(l) and 76.65 as set forth on Appendix A of this *Notice*. We seek comment on this proposal and any other reasonable implementation of Section 207.

8. We note that the original SHVIA good faith provision by its terms applied to "television broadcast stations." Similarly, the SHVERA good faith provision applies to "multichannel video programming distributors." We seek comment whether, under the statute, the good faith negotiating standards may be any different for carriage of significantly viewed television broadcast stations outside of their designated market area ("DMA").<sup>19</sup> Significantly viewed television broadcast stations do not have carriage rights outside of their DMA and carriage of their signals by out-of-market MVPDs is permissive. We seek comment as to whether the Commission has discretion under Section 325(b)(3)(C) to distinguish this situation. For example, if a television broadcast station from DMA X is significantly viewed in DMA Y and seeks carriage on an MVPD located in DMA Y, must the MVPD in DMA Y negotiate retransmission consent in good faith with the broadcaster from DMA X in exactly the same way that it negotiates with broadcasters that are located in DMA Y? Should the same good faith negotiation standard apply to broadcasters and MVPDs regardless of the DMA in which they reside? Should a different standard apply, and if so what standard? Should the good faith retransmission consent negotiation obligation apply only to MVPDs and broadcasters located in the same DMA? We seek comment on this issue.

### III. PROCEDURAL MATTERS

#### A. Initial Regulatory Flexibility Analysis

9. The Initial Regulatory Flexibility Analysis is attached to this *Notice* as Appendix B.

#### B. Initial Paperwork Reduction Act of 1995 Analysis

10. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

<sup>18</sup> H.R. Rep. No. 108-634, 108<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 19 (2004).

<sup>19</sup> A DMA is a geographic market designation created by Nielsen Media Research that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included. For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

### C. Ex Parte Rules

11. *Permit-But-Disclose.* This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under Section 1.1206(b) of the Commission’s rules.<sup>20</sup> *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>21</sup> Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

### D. Filing Requirements

12. *Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,<sup>22</sup> interested parties may file comments on this Notice **on or before** 30 days after publication in the Federal Register, and reply comments **on or before** 45 days after publication in the Federal Register. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (“ECFS”), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.<sup>23</sup>

13. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.

14. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

<sup>20</sup> See 47 C.F.R. § 1.1206(b); see also 47 C.F.R. §§ 1.1202, 1.1203.

<sup>21</sup> See 47 C.F.R. § 1.1206(b)(2).

<sup>22</sup> See *id.* §§ 1.415, 1.419.

<sup>23</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

15. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

16. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.


17. *Additional Information.* For additional information on this proceeding, contact Steven Broeckaert, [Steven.Broeckaert@fcc.gov](mailto:Steven.Broeckaert@fcc.gov), of the Media Bureau, Policy Division, (202) 418-2120.

#### IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that pursuant to Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, and Sections 1, 4(i) and (j), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 325, **NOTICE IS HEREBY GIVEN** of the proposals and tentative conclusions described in this Notice of Proposed Rulemaking.

19. **IT IS FURTHER ORDERED** that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

  
Marlene H. Dortch  
Secretary

## Appendix A

## PROPOSED RULE CHANGES

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 – Multichannel Video and Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

**AUTHORITY:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.64(l) is amended as follows:

**§ 76.64 Retransmission Consent.**

\*\*\*\*\*

(l) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make or negotiate any agreement with one multichannel video programming distributor for carriage to the exclusion of other multichannel video programming distributors. This paragraph shall terminate at midnight on December 31, 2009.

3. Section 76.65 is amended as follows:

**§ 76.65 Good Faith and Exclusive Retransmission Consent Complaints.**

(a) *Duty to Negotiate in Good Faith.* Television broadcast stations and multichannel video programming distributors shall negotiate in good faith the terms and conditions of retransmission consent agreements to fulfill the duties established by section 325(b)(3)(C) of the Act; provided, however, that it shall not be a failure to negotiate in good faith if: (1) the television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations; or (2) the multichannel video programming distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations. If a television broadcast station or multichannel video programming distributor negotiates in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.

(b) *Good Faith Negotiation.*

(1) *Standards.* The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the "Negotiating Entity") duty to negotiate retransmission consent agreements in good faith:

- (A) Refusal by a Negotiating Entity to negotiate retransmission consent;
- (B) Refusal by a Negotiating Entity to designate a representative with authority make binding representations on retransmission consent;
- (C) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;
- (D) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal.

- (E) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;
  - (F) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and
  - (G) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.
- (2) *Totality of the circumstances.* In addition to the standards set forth in subsection 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in subsection 76.65(a).
- (c) *Good Faith Negotiation and Exclusivity Complaints.* Any television broadcast station or multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this section or subsection 76.64(l) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in Section 76.7 of this part.
- (d) *Burden of proof.* In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.
- (e) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:
- (1) a complainant enters into a retransmission consent agreement with a television broadcast station or multichannel video programming distributor that the complainant alleges to violate one or more of the rules contained in this subpart; or
  - (2) a television broadcast station or multichannel video programming distributor engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor; or
  - (3) the complainant has notified the television broadcast station or multichannel video programming distributor that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules contained in this subpart.
- (f) *Termination of rules.* This section shall terminate at midnight on December 31, 2009.



## APPENDIX B

## Initial Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")<sup>24</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in Section III.D. of the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>25</sup> In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>26</sup>

## Need for, and Objectives of, the Proposed Rule Changes

Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") extends Section 325(b)(3)(C) of the Communications Act until 2010 and amends that section to impose reciprocal good faith retransmission consent bargaining obligations on multichannel video programming distributors ("MVPDs").<sup>27</sup> This section alters the bargaining obligations created by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which imposed a good faith bargaining obligation only on broadcasters.<sup>28</sup> This *Notice* achieves these statutory objectives by opening the present proceeding and proposes rule changes to Part 76 of the Commission's rules to implement Section 325(b)(3)(C).<sup>29</sup>

## Legal Basis

The proposed action is authorized under Sections 1, 4(i) and (j), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 325.

## Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.<sup>30</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small

<sup>24</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

<sup>25</sup> See 5 U.S.C. § 603(a).

<sup>26</sup> See 5 U.S.C. § 603(a).

<sup>27</sup> The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (2004) (to be codified at 47 U.S.C. § 325). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005."

<sup>28</sup> SHVIA was enacted as title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

<sup>29</sup> See proposed rules contained in Appendix A to this *Notice*.

<sup>30</sup> 5 U.S.C. § 603(b)(3).

organization,” and “small government jurisdiction.”<sup>31</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>32</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>33</sup>

The proposed rules contained in this *Notice*, as required by statute, are intended to require MVPDs to negotiate retransmission consent in good faith with television broadcast stations.<sup>34</sup> Therefore, “MVPDs,” which includes Cable and other Program distributors and Satellite Carriers, will be directly and primarily affected by the proposed rules, if adopted. In addition, because Section 207 also extends until 2010 the good faith negotiation obligations of broadcasters, we believe the proposed rules, if adopted, will also directly affect television broadcast stations. Therefore, in this IRFA, we consider, and invite comment on, the impact of the proposed rules on small television broadcast stations, small cable and satellite operators, and other small entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

*Cable and Other Program Distribution.* Cable system operators fall within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>35</sup> According to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million.<sup>36</sup> The Commission therefore estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

*Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA’s approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.<sup>37</sup> We last estimated that there were 1,439 cable operators that qualified as small cable

<sup>31</sup> 5 U.S.C. § 601(6).

<sup>32</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>33</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>34</sup> See, *supra*, Section II of the *Notice*; see also 47 U.S.C. § 325(b)(3)(C).

<sup>35</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>36</sup> U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>37</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. For “regulatory simplicity,” the Commission established the company size standard in terms of subscribers, rather than dollars; in the cable context, \$100 million in annual regulated revenues equates to approximately 400,000 subscribers. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Doc. Nos. 92-266 and 93-215, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408-7409, ¶¶ 28-30 (1995).

companies at the end of 1995.<sup>38</sup> Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the proposals contained in this *Notice*.

*Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for a “small cable operator,” which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>39</sup> The Commission has determined that there are 67.7 million subscribers in the United States.<sup>40</sup> Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>41</sup> Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>42</sup> and therefore is unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act.

*Satellite Carriers.* The SHVERA defines the term “satellite carrier” by reference to the definition in the copyright title 17.<sup>43</sup> This definition includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in Direct Broadcast Satellite (DBS) or Fixed-Satellite Service (FSS) frequencies.<sup>44</sup> As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket

---

<sup>38</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>39</sup> 47 U.S.C. § 543(m)(2).

<sup>40</sup> See Public Notice, “FCC Announces New Subscriber Count for the Definition of Small Cable Operator,” 16 FCC Rcd 2225 (2001) (“2001 Subscriber Count PN”). In this Public Notice, the Commission established the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers, and determined that this threshold will remain in effect until the Commission issues a superceding Public Notice. We recognize that the number of cable subscribers was recently estimated by the Commission to be almost 66.1 million, as of June 2004; see 2005 Cable Competition Report, FCC 05-13, ¶¶ 9, 21. However, because the Commission has not issued a public notice subsequent to the 2001 Subscriber Count PN, we propose to rely on the subscriber count threshold established by the 2001 Subscriber Count PN.

<sup>41</sup> 47 C.F.R. § 76.901(f).

<sup>42</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 U.S.C. § 573.

<sup>43</sup> See 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. § 119(d)(6).

<sup>44</sup> Part 100 of the Commission’s rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

earth station license.<sup>45</sup> For purposes of this IRFA, we tentatively conclude that the definition of “satellite carrier” would include all three types of entities described above, but nonetheless request comment on this issue.

The SBA has developed a small business size standard for Satellite Telecommunications, which consists of all such firms having \$12.5 million or less in annual receipts.<sup>46</sup> According to Census Bureau data for 1997, in this category there was a total of 324 firms that operated for the entire year.<sup>47</sup> Of this total, 273 firms had annual receipts of under \$10 million, and an additional twenty-four firms had receipts of \$10 million to \$24,999,999.<sup>48</sup> Thus, under this size standard, the majority of firms can be considered small.

*Direct Broadcast Satellite (“DBS”) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.<sup>49</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>50</sup> Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV<sup>51</sup> and EchoStar Communications Corporation (“EchoStar”),<sup>52</sup> report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision’s Rainbow Network, which also reports annual revenues in excess of \$12.5 million, and thus does not qualify as a small business.<sup>53</sup> The fourth DBS operator, Dominion Video Satellite, Inc. (“Dominion”), offers religious (Christian) programming and does not report its annual receipts.<sup>54</sup> The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

<sup>45</sup> See, e.g., *Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite*; *Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

<sup>46</sup> 13 C.F.R. § 121.201, NAICS code 517410 (changed from 513340 in October 2002).

<sup>47</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 513340 (issued October 2000).

<sup>48</sup> *Id.*

<sup>49</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>50</sup> *Id.*

<sup>51</sup> DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, FCC 05-13, ¶ 55 (rel. Feb. 4, 2005) (“2005 Cable Competition Report”).

<sup>52</sup> EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

<sup>53</sup> Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

<sup>54</sup> Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

*Fixed-Satellite Service ("FSS").* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.<sup>55</sup> The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>56</sup> Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Two of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

*Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating \$12.5 million or less in annual receipts.<sup>57</sup> Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.<sup>58</sup> Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.<sup>59</sup> Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO qualify as small entities.

*Other Program Distribution.* The SBA-recognized definition of Cable and Other Program Distribution includes these other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>60</sup> As previously noted, according to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million.<sup>61</sup> The Commission therefore estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

<sup>55</sup> See 47 C.F.R. § 2.1(c).

<sup>56</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>57</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>58</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 110. Previously, the Commission reported that IMCC had 250 members; see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("2004 Cable Competition Report").

<sup>59</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 110.

<sup>60</sup> 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

<sup>61</sup> U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

*Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>62</sup> HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003, and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent.<sup>63</sup> The Commission has no information regarding the annual revenue of the four C-Band distributors.

*Wireless Cable Systems.* Wireless cable systems use the Multipoint Distribution Service ("MDS")<sup>64</sup> and Instructional Television Fixed Service ("ITFS")<sup>65</sup> frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>66</sup> As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

In the 1996 MDS auction,<sup>67</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>68</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>69</sup> In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business

<sup>62</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>63</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. See 2004 Cable Competition Report, 19 FCC Rcd 1654-55, ¶¶ 73-4.

<sup>64</sup> MDS, also known as Multichannel Multipoint Distribution Service ("MMDS"), is regulated by Part 21 of the Commission's rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; 19 FCC Rcd 14165 (2004) ("MDS/ITFS Order").

<sup>65</sup> ITFS systems are regulated by Part 74 of the Commission's rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see MDS/ITFS Order, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

<sup>66</sup> See Local Multipoint Distribution Service, 12 FCC Rcd 12545 (1997) ("LMDS Order").

<sup>67</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

<sup>68</sup> 47 C.F.R. § 21.961(b)(1).

<sup>69</sup> See ITFS Order, 10 FCC Rcd at 9589.

licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.<sup>70</sup> MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.<sup>71</sup> There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

In the 1998 and 1999 LMDS auctions,<sup>72</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>73</sup> Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.<sup>74</sup> These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.<sup>75</sup> In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

*Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>76</sup> OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$ 12.5 million or less in annual receipts.<sup>77</sup> The

<sup>70</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

<sup>71</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

<sup>72</sup> The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

<sup>73</sup> See *LMDS Order*, 12 FCC Rcd at 12545.

<sup>74</sup> *Id.*

<sup>75</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

<sup>76</sup> See 47 U.S.C. § 573.

<sup>77</sup> 13 C.F.R. § 121.201, NAICS code 517510.

Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services.<sup>78</sup> As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.<sup>79</sup> Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification.<sup>80</sup> Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. ("RCN") is currently the largest BSP and 11th largest MVPD.<sup>81</sup> RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

*Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$12 million in annual receipts.<sup>82</sup> Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."<sup>83</sup> According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of June 26, 2004, about 860 of the 1,270 commercial television stations in the United States have revenues of \$12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>84</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations (LPTV).<sup>85</sup> Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated.

<sup>78</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 71.

<sup>79</sup> See 2004 Cable Competition Report, 19 FCC Rcd at 1659-60, ¶¶ 80-1.

<sup>80</sup> See 2005 Cable Competition Report, FCC 05-13, ¶ 71.

<sup>81</sup> *Id.* WideOpenWest is the second largest BSP and 15th largest MVPD, with cable systems serving about 288,000 subscribers as of September 2003. The third largest BSP is Knology, which currently serves approximately 174,957 subscribers as of June 2004; see 2005 Cable Competition Report, FCC 05-13, ¶ 71.

<sup>82</sup> See 13 C.F.R. § 121.201, NAICS Code 515120 (adopted Oct. 2002).

<sup>83</sup> NAICS Code 515120. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>84</sup> "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

<sup>85</sup> FCC News Release, "Broadcast Station Totals as of September 30, 2002."



We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

### **Entities Not Directly Affected By Proposed Rules**

Because the scope of Section 207 broadly impacts television broadcast stations and MVPDs, we believe that all of the entities, large and small, that are impacted by Section 207 are directly impacted. Nevertheless, although not required by the RFA, we invite comment from any other small entity which may be indirectly impacted from our proposed implementation of Section 207, but only to the extent that the impact on small entities can be minimized while fully implementing that section.

### **Description of Projected Reporting, Record Keeping and other Compliance Requirements**

Section 207 of the SHVERA was enacted to extend Section 325(b)(3)(C) of the Communications Act until 2010 and amend that section to impose reciprocal good faith retransmission consent bargaining obligations on MVPDs. The proposed rule changes that we believe will directly affect reporting, recordkeeping and other compliance requirements are described below.<sup>86</sup>

This *Notice* proposes rules that would require MVPDs to negotiate retransmission consent in good faith in conformance with Section 325(b)(3)(C) of the Communications Act and amended Section 76.65 of the Commission's rules. Section 76.65 of the Commission's rules is already in place and applicable to broadcasters.<sup>87</sup> The *Notice* proposes only to impose these same rules on MVPDs.

This *Notice* further requires that MVPDs bringing good faith complaints pursuant to Section 325 will follow the same petition process now in place for broadcasters, as required by Sections 76.5, 76.7 and 76.65 of the Commission's rules.<sup>88</sup> Therefore, entities seeking a good faith determination would file a complaint pursuant to the pleading requirements in Section 76.7(a)(2) and use the methods described in Section 76.65 to demonstrate a violation of Section 325(B)(3)(C).

Furthermore, this *Notice* seeks comment on whether the Commission can impose different good faith retransmission consent negotiating standards for carriage of significantly viewed television broadcast stations outside of their designated market area ("DMA").<sup>89</sup> Significantly viewed television broadcast stations do not have carriage rights outside of their DMA and carriage of their signals by out-of-market MVPDs is permissive. The *Notice* seeks comment as to whether Section 325(b)(3)(C) permits the Commission to account for this distinction.

### **Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered**

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the

<sup>86</sup> See proposed rules contained in Appendix A to this *Notice*.

<sup>87</sup> See, e.g., *supra* ¶ 3 of the *Notice* (negotiation standards).

<sup>88</sup> See 47 C.F.R. §§ 76.5, 76.7, 76.65; see also, *supra*, Section II of the *Notice*.

<sup>89</sup> A DMA is a geographic market designation created by Nielsen Media Research that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included. For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>90</sup>

With respect to the implementation of amended Section 325, the SHVERA does not offer much flexibility with respect to minimizing its impact on small entities. In seeking analogous good faith obligations for MVPDs and broadcasters, Congress apparently sought to apply to MVPDs the existing regulatory framework concerning good faith retransmission consent negotiation obligations.<sup>91</sup> Accordingly, the SHVERA employs identical language to apply the existing good faith obligation to MVPDs.<sup>92</sup> Therefore, the Commission does not have discretion to impose differing good faith standards for small MVPDs than those for larger entities.

The statute's compliance requirements primarily impact MVPDs, such as cable and DBS providers. As discussed above, a large number of cable and other programming distributors, such as OVS, wireless cable systems and PCOs, are likely to be small businesses. As also discussed above, however, the SHVERA appears to give the Commission no discretion to craft alternate rules to minimize the impact of Section 325(b)(3)(C) on small entities. As previously noted, there are now only four DBS licensees, none of which are small entities. Small businesses do not generally have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services.

In any event, we do not anticipate that the rules we propose today will have a significant impact on small entities. In order to gain carriage on MVPDs, broadcasters must either elect must carry or retransmission consent. If must carry is elected, the good faith rules are inapplicable. If retransmission consent is elected, the parties must negotiate a carriage agreement. The proposed good faith rules merely require broadcasters and MVPDs to negotiate in accordance with the basic requirements of Section 76.65.<sup>93</sup> If they do so, the failure to reach a carriage agreement is not a violation of our rules or the Communications Act. Broadcasters, large and small, have had to comply with the good faith obligation since 2000.

Nevertheless, to the extent they are affected, we urge small broadcast stations and small MVPDs to provide data on the impact of the proposals and issues raised in the *Notice*, including how we might, consistent with the statutory directives of Section 207, tailor our proposals to address and minimize the impact on small businesses. We expect that, whichever alternatives are chosen, the Commission will seek to minimize any adverse effects on small entities, to the extent permitted by statute.

We believe that Section 207 of the SHVERA will benefit small broadcast stations. Since the imposition of the good faith negotiation obligation in 2000, broadcasters have had a good faith obligation without a corresponding obligation on the part of MVPDs. The proposed amendments to Section 76.65 will level the playing field in this regard. In fact, the express intent of the statute was to level the competitive playing field between cable operators and satellite providers.<sup>94</sup> Congress, however, recognized that the SHVERA may impact the competitiveness cable operators of all sizes, including "rural cable operators," and thus directed the Commission to conduct an inquiry in a separate proceeding on the impact of specific provisions of the Communications Act of 1934, as amended, the SHVERA

<sup>90</sup> 5 U.S.C. § 603(c)(1)-(c)(4)

<sup>91</sup> See 17 U.S.C. § 119(a)(3); *House Commerce Committee Report* at 1 (Purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"); see also, *supra*, Section III.A.3. of the *Notice*.

<sup>92</sup> 17 U.S.C. § 119(a)(3).

<sup>93</sup> See, e.g., *supra* ¶ 3 of the *Notice* (negotiation standards).

<sup>94</sup> See *id.*

provisions, and Commission rules on competition in the MVPD market.<sup>95</sup> Accordingly, the Commission has issued a Public Notice to initiate this inquiry.<sup>96</sup>

**Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals**

None.

---

<sup>95</sup> See Section 208 of SHVERA. The Commission is required to submit a report to Congress on the results of its inquiry no later than nine months after SHVERA's enactment date (*i.e.*, September 8, 2005).

<sup>96</sup> Public Notice, "Media Bureau Seeks Comment For Inquiry Required By the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition In the Television Marketplace," MB Docket No. 05-28, DA 05-169 (rel. Jan. 25, 2005) (Comments are due March 1, 2005; replies are due March 16, 2005.).